

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: August 25, 1997

Case No. 95 INA 340

In the Matter of:

POLMEX CORPORATION,
Employer

on behalf of

JAROSLAW ZALESKI,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Jaroslaw Zaleski (Alien) by Polmex Corporation (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application the Employer and the Alien requested review under to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-able at the time of the application and at the place where

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On April 4, 1994, the Employer, which was operating a "garage" business, applied for labor certification to permit it to employ the Alien permanently as a "carburetor repairer" to perform the following duties:

Repairs and adjusts motor vehicle carburetors.
 Disassembles carburetors and gasoline filter units.
 Repairs or replaces defective parts. Reassembles carburetor and gasoline filter, install them in vehicle.
 Starts engine and turns adjustment screw to regulate flow of air and gasoline through carburetor. Examines parts for defects and test needle valves with wire, gauges and flowmeter. Install and repair mechanical devices that convert conventional systems to use of other fuels.

Notice of Findings. The CO's Notice of Findings proposed to deny certification subject to Employer's rebuttal. Citing 20 CFR §656.3, the CO noted that certification required the job offer to meet the definition of Employment as permanent, full-time work. The CO explained that Employer's business activity was a "garage" and questioned whether the Employer's garage needed a full time worker, whose only function would be to perform the carburetor repairs it described in its application. The CO then added,

Employer may rebut this finding by submitting evidence which fully demonstrates that this job offer meets the definition "Employment" as defined by the above cited regulation with documentation to include information regarding the total number of employees within this organization, the total number of workers on employer's payroll who presently perform the job duties described in this instant application and if there are no such workers presently employed, document how it has been determined that there is a need for a permanent full-time worker in the position document whether the worker in this position will perform any other functions and if so, what they are and the percentage of time he will spend doing each and

any other information which would show employer's ability to guarantee permanent full-time work for this job offer.

Rebuttal. The Employer's rebuttal was typed on stationary bearing the letterhead "Polmex Motors, Inc. - Used Car Dealer" and it said,

I have myself and only one employee working in my garage at this time and my main purpose is to specialize in the repairing of carburetors and we are doing very well at this time. I have a large amount of carburetors that has to be repaired on a daily basis and most of the time we are unable to finish on time, because besides of the fact that we are repairing carburetors, we are also doing regular tune-ups. I myself and my worker has to perform all the work on a daily basis and try to finish all the work on time, just because we only have a garage and I do not have enough space to park the cars at the end of the day, which is forcing us to finish all the work before day end. We have done so in the past and were very successful, but now because of the number of clients I have build up, primarily clients with carburetor problems, are always coming back to us and unfortunately I can not finish my work on time anymore. That is exactly the reason I need Mr. JAROSLAW to work for me. This alien has 4 years experience in repairing carburetors, which should make my garage function nice and smooth.

Final Determination. In the Final Determination issued October 27, 1994, the CO determined that the Employer failed to document the volume of its business that was dependent on carburetor repairs, saying that it was unclear what the Employer considered to be a large amount of repair work and it could not be determined to what extent the major percentage of the clients served warrant the services of an individual who specialized only in carburetor repairs. The CO then concluded that the Employer had failed to document that its job opening was for a permanent full time position and denied the application.

Appeal. After the Employer requested review of the denial of certification, the Appellate File was referred to the Board.

DISCUSSION

20 CFR § 656.3 provides, "'Employment' means permanent full-time work by an employee for an employer other than oneself." The Board has held that an employer bears the burden of proving that a position is permanent and full-time. Certification may be denied, if the employer's own evidence does not show that the position is permanent and full time. **Gerata Systems**

America, Inc., 88 INA 344 (Dec. 16, 1988). It follows that, if a CO reasonably requests specific information to aid in the determination of whether or not a position is permanent and full time, the employer must provide it. **Collectors International, Ltd.**, 89 INA 133 (Dec. 14, 1989).

We agree with the CO that the Employer's rebuttal to did not respond adequately to the NOF in that the information it furnished was too vague to permit a determination as to whether or not the Employer's volume of carburetor repairs was great enough to warrant the full-time services of an employee who would engage only the work set forth in its application.²

Accordingly, it is concluded that the CO's denial of certification was supported by the evidence of record. As we have concluded that the Employer's application for certification was properly denied by the CO, the following order will enter.

ORDER

The Certifying Officer's denial of certification is Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

²In its request for review the Employer included what it considered to be documentation of its need for a full time carburetor repairer. If admitted to the record at this time, the new evidence would not alter the CO's denial of certification, as the Employer did not offer any proof as to the volume of its carburetor repairs. The documents consist of five sample invoices to the Employer for various automotive parts delivered on dates that extend over a three month period and they include only a single invoice to a customer for a variety of automobile repairs. This evidence cannot be considered because it was not of record at the time of the Final Determination, however. **Memorial Granite**, 94 INA 066 (Dec. 23, 1994).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO. 95 INA 340

POLMEX CORPORATION, Employer
JAROSLAW ZALESKI, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

June 6, 1997